



REPUBLIC OF KENYA
IN THE HIGHCOURT OF KENYA
AT ELDORET
HC. CIVIL CASE NO. 157 OF 2010

ESTHER JELIMO KURUI 1ST PLAINTIFF
SALLY JEPKOSGEI KIBET 2ND DEFENDANT

=VERSUS=

MURIGI WANYOIKE DEFENDANT

RULING

I have two applications before me for determination. The first application is by the plaintiffs and they seek one main order of temporary injunction restraining the defendant from trespassing or interfering with the plaintiffs' user of LR No. Pioneer/Ngeria/Block 1/Estate/9622 pending the hearing and determination of this Suit. In the grounds on the face of the application, the plaintiffs state that they have a prima facie case; that damages are not an adequate remedy and that the balance of convenience favours maintaining the status quo. The application is supported by an affidavit sworn by 1st plaintiff. There is also a supplementary affidavit sworn by one Musa Kipchebii Kimurgong, the plaintiff's husband. In those affidavits the plaintiffs aver that they are lawfully registered as proprietors of the said title upon which the defendant, from 22nd October, 2010 trespassed thereon. The application is opposed and there is a replying affidavit sworn by the defendant who deponed, *inter alia*, that he is in occupation of LR No. Pioneer/Ngeria Block 1(EATEC) 9622 which is a subdivision of LR No. Pioneer/Ngeria Block 1 (EATEC) 664; that the said parcel No. 644 was itself formally part of parcel No. 145 A and 145 B; that the defendant together with **Joseph Ouma Rasomo, Maurice Omondi Akoth, Paschalia Opany Aketch, Philip Raburu** and **Jilinde Self Help Group** purchased parcel No. 145 B from Lonrho Agribusiness (East Africa) Limited which parcel eventually became Pioneer/Ngeria Block 1 (EATEC) 664; that the purported subdivision of the said parcel to create Pioneer/Ngeria block 1 (EATEC) 9622 was fraudulent and irregular; that the said sub-division notwithstanding, the defendant is still in occupation of the same and that the plaintiffs are using this application to evict him.

The 2nd plaintiff responded to the averments in the replying affidavit by her supplementary affidavit in which she deponed, *inter alia*, that the description of LR Pioneer/Ngeria Block 1 (ESTATE) in the plaint and the Chamber Summons was a mistake and sought leave of the court to correct the error and consider the application on merit; that the defendant is in fact in actual occupation of LR No. Pioneer/Ngeria block 1 EATEC) 666 and not LR No. Pioneer/Ngeria Block 1 (EATEC) 9622; that L.R. No. Pioneer/Ngeria Block 1 (EATEC) 9622 was originally owned by **Jilinde Self Help Group** who transferred it to **Margaret Muhonja Mahugu** aforesaid who then lawfully transferred it to the plaintiffs. In the premises, the 2nd plaintiff claims a Superior title to the subject piece of land.

The above are the pleadings in respect of the plaintiff's application. The second application is by

the defendant who seeks one relief apart from costs namely that the order of injunction granted on 5th November, 2010 in favour of the plaintiffs be discharged. The main grounds for the application as expressed on the face of the application are that the defendant has been in occupation of LR No. Pioneer/Ngeria Block 1 (EATEC) 9622 since the year 2001; that the orders of injunction were obtained by concealment of the fact that the defendant was in possession of the said land and that LR No. Pioneer/Ngeria Block 1 (ESTATE) 9622 is non-existence. The application is supported by an affidavit sworn by the defendant which is an elaboration of the said grounds.

The plaintiffs have opposed the application on the basis of a replying affidavit sworn by the 1st plaintiff. It is deponed, *inter alia*, that the application is incompetent for failure to exhibit the order sought to be discharged; that the plaintiffs are the sole registered proprietors of LR No. Pioneer/Ngeria Block 1 (EATEC) 9622; that they are not guilty of non-disclosure; that the said title was lawfully purchased from **Margaret Muhonja Mahugu** who was the registered proprietor of the subject title; that at the time of the purchase, the defendant had no structure thereon nor was the title encumbered in any way; that they did not know that the defendant had a maize crop on the subject title; that the temporary injunction was properly obtained and should be maintained.

When served with the replying affidavit, the defendant filed a supplementary affidavit in which he reiterated that the plaintiffs' desire is to evict him from the subject title yet their title was not irregularly acquired.

The plaintiffs have filed an amended plaint in which the subject title is amended to read Pioneer/Ngeria Block 1(EATEC) 9622 instead of Pioneer/Ngeria Block 1 (ESTATE) 9622. The defendant has delivered a defence and a counter-claim. In the defence, the plaintiffs' claim is denied. It is also pleaded that the defendant acquired a portion of L.R. No. Pioneer/Ngeria/Block 1 (EATEEC) 664- but his name was erroneously omitted from the register and that notwithstanding the omission, he is in occupation of 5 acres of L.R. Pioneer/Ngeria block 1 (EATEC) 664. He further pleaded that the creation of L.R. No. Pioneer/Ngeria Block 1 (EATEC) 9622 was fraudulent and legally untenable and should be cancelled. In those premises, the defendant counter-claims for the cancellation and for rectification of title to revert to LR. No. Pioneer/Ngeria Block 1 (EATEC) 664.

The defendant has filed an amended defence and counter-claim to address the averments in the amended plaint.

The pleadings were in that state when the applications came up for hearing before me on 30th March, 2011. Counsel agreed to file written submissions in respect of both applications which submissions were in place by 18th May, 2011. The submissions substantiated the parties' stand-points taken in their respective affidavits and pleadings.

I have considered the pleadings on record, the affidavits filed and the submissions of counsel made on behalf of the respective parties. The two applications to my mind in reality amounts to only one application. If I decide that there is no case for an interim injunction, the defendant's application succeeds and if I decide that the temporary injunction issued ex-parte ought to be maintained the defendant's application thereby fails.

Before decided the matter either way, it may be convenient to set out the principles which guide the court in an application for interlocutory injunctive relief. Those principles were crystallized in the precedent setting case of **Giella –vrs Cassman Brown Limited [1973] E.A. 358**. The principles are: - First the applicant must make out a prima facie case with a probability of success at the trial; Secondly, normally an injunction will not be issued unless it can be shown that the applicant is likely to suffer an irreparable injury which cannot adequately be compensated in damages; and thirdly, if the court is in doubt about the existence or otherwise of a prima facie case, it should decide the application on a balance of convenience.

Applying those principles to the matter at hand, I ask myself whether the plaintiff has made out a prima facie case. At the trial, the plaintiffs will be required to demonstrate that they are entitled to a perpetual

injunction restraining the defendant from trespassing upon L.R. No. Pioneer/Ngeria Block 1 (EATEC) 9622 and interfering with the plaintiffs user and occupation of the said title. Have they made out such a case? from the affidavit evidence filed by the plaintiffs, it cannot be gainsaid that as at the time of institution of this suit and application that they were and are the registered proprietors of L.R. No. Pioneer/Ngeria Block 1(EATEC) 9622. They have exhibited a copy of the title deed of the same and a current Certificate of Official Search thereof. The two documents indicate the plaintiffs as the registered proprietors with effect from 8th October, 2010. The title deed shows that the said title was created from partition of L.R. No. Pioneer/Ngeria Block 1 (EATEC) 664.

The plaintiffs have therefore demonstrated, *prima facie*, that they are the absolute registered proprietors of L.R. No. Pioneer/Ngeria Block 1 (EATEC) 9622.

And, what is the defendant's challenge? He contends that the creation of the said title was fraudulent and irregular. The foundation of that contention is that he purchased 5 acres of the original L.R. No. Pioneer/Ngeria Block 1 (EATEC) 664 from **Lonrho Agribusiness (East Africa) Limited** and together with **Joseph Ouma Rasowo, Maurice Omondi Aketch, Philip Raburu and Jilinde Self Help Group** purchased another five acres of the same title – But his name was erroneously omitted from the latter transaction. He further contends that he has been in occupation of the two portions since the year 2001 which fact the plaintiffs failed to disclose at the ex-parte stage. So he traces his claim to title to the suit property to the original sale by Lonrho Agribusiness (East Africa) Limited. With respect to one portion of the Suit property, he contends that his name was erroneously excluded from the original sale transaction and with respect to the second portion he alleges an irregular and fraudulent subdivision and transfer to one **Margaret Muhonja Mahugu** and subsequently to the plaintiffs.

Apart from the bare allegation of illegality and fraud in respect of the transfer to the plaintiff, the defendant has not blamed the plaintiffs in any material way. He has indeed not given any particulars of fraud or illegality. In his defence and counter-claim, he does not state who is to blame for the omission to include his name in the original purchase of a portion of L.R No. Pioneer/Ngeria/Block 1 (EATEC) 664. He certainly cannot blame the plaintiff for the omission. The documents accepted by both sides disclose that the plaintiffs acquired title of the suit land from **Margaret Muhonja Mahugu** who was the registered proprietor as on 26th October, 2009. The Plaintiffs further state that the said **Margaret Muhonja Mahugu** acquired her title from **Jilinde Self Help Group**. *Prima facie*, a claim based on fraud and illegality in respect of the registration of the suit land in the name of the plaintiffs is unlikely to succeed unless the said **Margaret Muhonja Mahugu** and **Jilinde Self Help Group** are joined. It is significant that the defendant has sought no orders against the two nor has he particularized any blameworthiness against them. Further the registration in favour of the plaintiffs was obviously effected by the Land Registrar. The defendant does not lay any blame against the said officer. In those premises, I find, *prima facie*, that the defendants' Counter-Claim for cancellation of title number Pioneer/Ngeria Block 1 (EATEC) 9622 and restoration of title number Pioneer/Ngeria block 1 (EATEC) 664 to include his name, will probably fail at the trial. That being my view of defendant's case, I find on a *prima facie* basis, that the defendant's defence and counter-claim are not an adequate answer to the plaintiffs' claim. The plaintiffs, in my view and so I find on a *prima facie* basis, hold a valid title to the suit land. That title to my mind is superior to the defendant's interest. It is trite that where there are competing interests over a title, the interests of the registered proprietor should be protected as against the interest of other claimants.

So, on affidavit evidence, there is a *prima facie* case that the plaintiffs will at the trial get the perpetual injunction which is sought on the basis that they are the registered proprietors of the suit land and the challenge raised by the defendant is weak. I also find that unless the injunction is granted, the plaintiffs stand to suffer damages which, in my view, cannot adequately be compensated in damages. On a balance of convenience, I find that the same tilts in favour of granting the injunction since the defendant does not appear to have a valid claim against the plaintiffs.

I have deliberately considered these applications on the basis that the subject title is L.R. Pioneer /Ngeria block 1 (EATEC) 9622. The Number given in the application as Pioneer/Ngeria block 1 (ESTATE) 9622 in my view is a mere misdescription which has not prejudiced the defendant in any way as the title and

the Official Certificate of Search annexed to the supporting affidavit clearly provided the subject properly.

I have also not found the plaintiffs guilty of material non-disclosure. I have not so found because the defendant does not reside on the suit property. He has only utilized it for growing crops and grazing livestock. The act of cutting trees which the plaintiffs witnessed on 22nd October, 2010 parse would not demonstrate that the defendant was in physical occupation of the suit land.

The defendant has therefore not demonstrated that the plaintiffs are guilty of material non-disclosure to entitle him to an order discharging the injunction.

In the result, the defendant's application dated 31st January, 2011 and filed on 2nd February, 2011 is without merit and is dismissed.

The Plaintiffs are granted a temporary injunction as prayed in respect of LR/NO./Pioneer/Ngeria Block 1 (EATEC) 9622 pending the hearing and determination of this suit. Each party will bear its own costs of the applications.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS
5TH DAY OF AUGUST 2011.**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

1. Mr. **Barasa** for the applicant in the main application and
2. Mr. **Momanyi** for the respondent.

**F. AZANGALALA
JUDGE
5/8/2011.**